NOT FOR PUBLICATION IN WEST'S BANKRUPTCY REPORTER:

Decision: Order Denying Motion to Review and Disgorge Attorney's Fees

Case: In re Wayne, Case No. 03-01891

Dated: March 12, 2005.

It is hereby
ORDERED that the Order set forth below is hereby signed as an order of the court to be entered by the clerk.

Signed: March 12, 2005.

S. Martin Teel, Jr.
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF COLUMBIA

In re	)	
	)	
DANA D. WAYNE,	)	Case No. 03-01891
	)	(Chapter 13)
Debtor.	)	

ORDER DENYING MOTION TO REVIEW AND DISGORGE ATTORNEY'S FEES

Invoking 11 U.S.C. § 1329 and F.R. Bankr. P. 9011, the chapter 13 trustee seeks an order compelling the debtor's counsel, Harris S. Ammerman, to disgorge the fees he received in this case because he filed the petition commencing the case while the debtor's prior case was still pending. The court orally denied the motion at a hearing last year but neglected to reduce the directive to a written order. In what was an extremely close call, the court concluded that arguably novel issues did not warrant sanctions this time. However, filing a new case in the same circumstances in future cases will result in sanctions.

I

To understand why re-filings are generally barred when an

old case is still pending, it is useful to review what happens in the typical chapter 13 case, unlike this case. In probably most chapter 13 cases there are creditors who file claims other than just the debtor's mortgagee. When the mortgagee obtains relief from the automatic stay, the case is not ready to be closed because those other creditors' claims have not been paid. With the case remaining ongoing a new filing is barred because, ordinarily, a new bankruptcy case ought not be filed during the pendency of another bankruptcy case. Cf. Freshman v. Atkins, 269 U.S. 121 (1925) (a pending case in which the discharge has not been entered bars the entry of a discharge in a new case addressing the same debts). If the debtor wants to pursue a new case, he must await either the entry of a discharge upon completing plan payments or obtain a dismissal of the case. If the debtor obtains a voluntary dismissal of the case, however, 11 U.S.C. § 109(g)(2) bars the filing of a new case for 180 days after dismissal of the prior case. This gives the mortgagee sufficient time to complete a foreclosure.

Occasionally only the debtor's mortgagee files a claim in a chapter 13 case, and occasionally the mortgagee, after obtaining relief from the automatic stay, sets a foreclosure sale for a date *after* the debtor receives a discharge and the

case is closed. Generally nothing bars the debtor from filing a new case, and the case will not be dismissed as abusive if there are changed circumstances which demonstrate that the debtor can now successfully address his mortgage defaults under a chapter 13 plan. However, in this case, the mortgagee set the foreclosure sale for a date *before* the closing of the old case.

II

The debtor filed this case during the pendency of his prior chapter 13 case, Case No. 00-02055. However, Ammerman relied on In re Cowan, 235 B.R. 912 (Bankr. W.D. Mo. 1999), which holds that in the absence of evidence of bad faith, a chapter 13 case can be filed during the pendency of a chapter 7 case as long as a discharge has been entered in the prior chapter 7 case before the commencement of the chapter 13 case. Ammerman urged that Cowan applies as well when a discharge is ready to be entered and the trustee delays in taking steps to have the discharge entered. The only holder of a filed claim, SunTrust Mortgage, whose prepetition arrears claim was being paid under the plan, had obtained relief from the automatic stay, based on the debtor's failure to pay certain postpetition monthly mortgage payments, to permit it to proceed to foreclosure. It refused to accept plan

distributions, presumably because it did not want to prejudice its ongoing foreclosure efforts. In a letter (a copy of which Ammerman received) the trustee had directed the debtor's employer to cease sending plan payments (out of the debtor's wages) to the chapter 13 trustee, and had stated that the case "is in the process of being closed as completed" and that "[t]he debtor is entitled to a discharge of debts." Based on this, Ammerman viewed the debtor as entitled to a discharge and thus not barred from filing a new case.

However, prior to the filing of the petition commencing this new case on October 15, 2003, the court had entered an order in the debtor's prior bankruptcy case on October 2, 2003, reducing the allowed amount of prepetition arrears to be paid SunTrust under the plan to the amount already paid by the trustee and accepted by SunTrust, and giving SunTrust 30 days to file a deficiency claim if its foreclosure sale failed to pay the entire amount of its claim. The prior case was thus *not* ready to be closed when Ammerman filed this new case on behalf of the debtor. The court rejects any argument that the trustee's form letter to the employer estops her from arguing that the case was not ready to be closed and any argument that a debtor's counsel may reasonably rely on such a letter in ascertaining whether the case is indeed ready to be

closed before filing a new case. The court serves notice that any such argument in future cases will not pass muster under Rule 9011.

III

The filing of this second case was for the purpose of obtaining a new automatic stay when the automatic stay had already been terminated in the prior case. By reason of § 109(g)(2), the debtor could not have achieved that result by voluntarily dismissing the first case and then filing this second case. See In re Hollberg, 208 B.R. 755 (Bankr. D.D.C. 1997). So long as the prior case had not been dismissed and thus was pending without it being ready to be closed (because the mortgagee might file a deficiency claim within the 30 days allowed by the court's order), the filing of this case to achieve an automatic stay, and to circumvent § 109(g)(2), constituted an abuse of the bankruptcy system. Cf. In re Allen, 300 B.R. 105, 122-23 (Bankr. D.D.C. 2003). The court declined to impose sanctions only because Ammerman put forth his arguments in the novel context of the trustee herself having seemingly viewed the case as ready to be closed.

IV

It is accordingly

ORDERED that the trustee's motion for imposition of

sanctions in this case is DENIED, but sanctions will be imposed against any debtor's counsel who files a future case in the same circumstances as this case.

[Signed and dated above.]

Copies to: Cynthia A. Niklas; Harris S. Ammerman; Office of U.S. Trustee.

End of Order